STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED February 24, 2005
v	No. 252766 Wayne Circuit Court
ASHLEY MARIE KUJIK, Defendant-Appellant.	LC No. 03-009100-01

Before: Murray, P.J., and Meter and Owens, JJ.

METER, J. (*dissenting*).

I respectfully dissent. Indeed, the application of MCL 750.122(8) to defendant's conduct was in accordance with the language of the statute. I would affirm.

Defendant claims that the trial court erred in instructing the jury that MCL 750.122(8) applied regardless of whether an official proceeding had actually taken place. This issue raises a question of statutory interpretation. "The fundamental rule of statutory construction is to discern and give effect to the intent of the Legislature." *People v Venticinque*, 459 Mich 90, 99; 586 NW2d 732 (1998). If the statute's language is clear and unambiguous, this Court must enforce the language as written. *Id.* at 99-100. Unless defined in the statute, every word or phrase "should be accorded its plain and ordinary meaning, taking into account the context in which the words are used." *Phillips v Jordan*, 241 Mich App 17, 22 n 1; 614 NW2d 183 (2000). If a term is not expressly defined in the statute, this Court may consult dictionary definitions in order to construe the term "in accordance with [its] ordinary and generally accepted meaning[]." *People v Morey*, 461 Mich 325, 330; 603 NW2d 250 (1999).

MCL 750.122(8) provides, in pertinent part:

> A person who retaliates, attempts to retaliate, or threatens to retaliate against another person for having been a witness in an official proceeding is guilty of a felony punishable by imprisonment for not more than 10 years or a fine of not more than $20,000.00 or both.

MCL 750.122(9) provides:

> This section applies regardless of whether an official proceeding actually takes place or is pending or whether the individual has been subpoenaed or

> otherwise ordered to appear at the official proceeding if the person knows or has reason to know the other person could be a witness at any official proceeding.

Defendant maintains that the phrase "for having been a witness in an official proceeding" in subsection 8 restricts application of this statute to situations in which the official proceeding has already been held and the witness has already testified. She points to the language of MCL 750.122(6), which proscribes interference with "the ability of a witness to attend, testify, or provide information in or for a *present or future* official proceeding" (emphasis added), and argues that if the Legislature had also intended for subsection 8 to apply to future proceedings, it would have incorporated the "present or future" language. Defendant contends that an ambiguity arises when subsection 8 is read in conjunction with subsection 9 and that the ambiguity must be construed in her favor.

I disagree with defendant's interpretation of subsection 8 and find no conflict or ambiguity when it is read in conjunction with subsection 9. In *People v Greene*, 255 Mich App 426, 438; 661 NW2d 616 (2003), this Court explained that MCL 750.122 "identif[ies] and criminalize[s] the many ways individuals can prevent or attempt to prevent a witness from appearing and providing truthful information in some sort of official proceeding[.]" The Court explained:

> In the most general sense, the Legislature identified four different categories of witness tampering: bribery (subsection 1), threats or intimidation (subsection 3), interference (subsection 6), and retaliation (subsection 8). That the Legislature chose *not* to place all these different types of tampering in the same subsection suggests that the Legislature considered them to be distinct. Conduct that violates one subsection in MCL 750.122 may not necessarily violate another subsection in the statute; conduct necessary to violate one subsection may be unnecessary to violate another. [*Id.* (emphasis in original).]

Retaliation is unique among the four categories of witness tampering because it refers to conduct committed in reaction to a witness' testimony, i.e., conduct committed *after* a witness has already testified. See *Random House Webster's College Dictionary* (2d ed), p 1109, defining "retaliate" as "to return like for like, esp. evil for evil," or "to requite or make return for (a wrong or injury) with the like." Subsection 8 prohibits not only retaliation and attempts to retaliate, but also threats to retaliate. The Legislature's inclusion of threats to retaliate in addition to retaliation and attempted retaliation clearly contemplates the act of threatening to retaliate against a person for being a witness in the future, after the witness has testified in an official proceeding. Accordingly, the phrase, "threatens to retaliate against another person for having been a witness in an official proceeding" can refer to the witness' status not at the time the threat is communicated, but at the future time when the threat will be carried out. The statute penalizes threats against a person "for having been a witness in an official proceeding," and this language encompasses a situation in which future harm is threatened against a person in anticipation of that person testifying in an official proceeding. Consequently, subsections 8 and 9 can be read in harmony with each other, without creating any ambiguity.

Defendant's reliance on the language differences between subsections 6 and 8 is misplaced. Subsection 6 addresses conduct that interferes with a witness to prevent him from testifying. *Greene, supra* at 438. Subsection 6 contemplates conduct that occurs during or

before an official proceeding, not after, because it refers to *interference with testimony*. The language difference between the two subsections simply reflects the difference between interference and retaliation. It does not reflect a legislative intent to restrict subsection 8 to acts and threats committed against a witness who has already testified in an official proceeding. Moreover, contrary to the majority's suggestion, construing subsection 8 in the manner set forth above does not "blur the distinction found by this Court in *Green, supra* and nullify much of MCL 750.122(3)." Indeed, subsection 8 specifically deals with *retaliation*, while subsection 3 does not. Further, the Court of Appeals' language cited from *Green* should not be used to trump the plain language of MCL 750.122.

I conclude that the trial court properly instructed the jury that the statute applied regardless of whether the official proceeding had actually taken place.

Defendant's two remaining issues are based on her erroneous interpretation of MCL 750.122(8). She argues that the jury verdict was against the great weight of the evidence because there was no evidence that Barnes had been a witness in an official proceeding, and she additionally argues that subsection 8 is void for vagueness because it conflicts with subsection 9, leaving her unable to discern what conduct the statute proscribes. Because I have concluded that subsection 8 prohibits threats to retaliate against a witness for testifying in a future proceeding and does not conflict with subsection 9, I reject these claims of error.

I would affirm.

/s/ Patrick M. Meter